UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PATRICIA A. MARTONE,

Plaintiff,

v. 11 CV 1990 (JGK)

ROPES & GRAY LLP,

Defendant.

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New York, N.Y.
November 23, 2011
3:26 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C.
Attorneys for Plaintiff
BY: ANNE C. VLADECK
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(Case called; in open court)

THE COURT: Good afternoon all.

This is a motion to compel by the plaintiff, and I've read the papers. I'm familiar with the arguments. I'm prepared to listen to anything you'd like to tell me in connection with the motion.

Ms. Vladeck.

MS. VLADECK: Your Honor, just a few things that I think have occurred in discovery that may bear on the motion that were after the submissions. Some of the documents that are part of the partial privilege log we received have been used in depositions and the like, which we believe adds to the waiver argument.

Moreover, Ropes & Gray in its papers refers to the investigation several times as an independent investigation. One of the things we also learned from the partial privilege log was that a draft investigation report was submitted to Ropes & Gray, and two weeks later the actual investigation report was issued after apparently a fair amount of input from the non-acting-as-lawyer partners, including Mr. Malt.

The other final thing with respect to the investigation and plaintiff's ability to challenge it is a sham is that during the depositions thus far, the executive coach that was hired by Ropes & Gray to deal with some of the management and personnel issues referred to the fact that he

and Mr. Malt, who I think is the decision-maker in this case although we're not yet sure, used as a shorthand the phrase "cover story," which was a message to give that might not have been the right message. For example, if certain action was going to be taken against Ms. Martone, to have it come from the coach as opposed to Mr. Malt. In addition --

THE COURT: What do you mean by executive coach?

MS. VLADECK: Ropes & Gray hired an individual who was considered an executive coach to work with partners at Ropes & Gray who were having issues.

THE COURT: Oh.

MS. VLADECK: And that particular coach has now been made a full employee of Ropes & Gray, and he referred to the use of cover story as a shorthand for him and Mr. Malt in how to message something.

In addition, Ms. Martone brought in a far amount of business during the time the investigation was going on. There was a memo that said essentially how do we come up with a story so that this isn't the only business that was brought in so that we can message it with other business brought in by other partners.

THE COURT: That doesn't necessarily go to the production of the report or the backup for the report.

MS. VLADECK: Well, it does in that it was during the time of the investigation. There's a question really not only

of the investigation and the privilege issues before your Honor going to the retaliation claim, but how the investigation was conducted both internally and externally. Also goes to pretext on the discrimination claim, so that really was the argument.

THE COURT: That seems to be a separate issue from the report itself. I mean it goes to the underlying claim of discrimination or retaliation, notions of how do we come up with an explanation, how do we come up with a story. If in fact any of that occurred would be an issue irrespective of the production of the report and what went into the report, unless those comments were directly related to the existence of the investigation of the report.

MS. VLADECK: I understand, your Honor. My only point on this is that one of their arguments with respect to why the privilege should be found and found not waived is that it was an independent investigation, and my point is that there's a real question as to the independence of the investigation. But I understand your Honor's point and with that I will sit down.

THE COURT: All right.

Defendants.

MR. CHINN: Your Honor, I'll be very brief and then I will try, in a few sentences, try to address what Ms. Vladeck just referred to.

So as we explain in our papers, and I won't go into detail, we think the first question here is: Does Ropes & Gray

rely on advice of counsel as a defense here? And we think the answer to that is no.

We think there's a second question though that is a more complicated one and that is: Is there an assertion of fact by Ropes & Gray that to be fair should permit access to privileged material for the purpose of rebutting that assertion of fact? And I think as we have clarified the offer that we made in our briefing on the issue, we have recognized that it's at least arguable. We're willing to concede for the purpose of this debate that to examine the statement by Mr. Malt during the meeting with Ms. Martone that an investigation had been completed and had determined that discrimination was not the cause of the decline of Ms. Martone's practice and that there were other plausible factors that did explain that decline in practice, we think that that raises the question.

Okay, that's an assertion of fact. It's not an attempt to rely on advice of counsel as a legal defense, but it's a factual statement that perhaps Ms. Martone is entitled to plumb to some degree. What would Martone need in fairness to her -- and that's the word that's repeatedly used in these cases -- to plumb that assertion?

And we would submit, as we have stated in our papers, that the report's conclusions would be appropriate to produce to Ms. Martone for that purpose so that she can determine whether Mr. Malt was telling the truth when he made that

statement.

THE COURT: If it's going to be fair, at the trial before the jury in the case, Ropes & Gray will put on testimony, as you say in your papers and as you've said now, that they hired a distinguished, large law firm to conduct an investigation, and the conclusion of the investigation was no discrimination. The conclusion of the investigation, if accepted by the jury, would defeat the plaintiff's first claim of discrimination. A distinguished, independent, allegedly independent, large law firm has said that there was no discrimination.

And you say, well, it's enough simply to find out whether Mr. Malt was telling the truth that that was what O'Melveny said because if they said it, then he obviously was able to rely on it for making his decisions and it's of no moment that the investigation may have been shoddy or biased or didn't look at all of the information because it reached a conclusion and he was telling the truth that this was the conclusion it reached.

That doesn't seem fair if Ropes & Gray is able to put before the jury, as it realistically has to -- that's part of the conversation; that's what it did -- it doesn't seem fair not to let the plaintiff at least say that conclusion was wrong. Here's why it was wrong. And not only in the sense of what the parties will be arguing out, which is was there

discrimination or wasn't there. I fully understand your position. That's going to be the issue.

And you say, well, all of these people are going to testify to personal knowledge, was there or was there not discrimination. But, in addition to that, there's going to be this other helper, this big investigation. And you say the only thing that has to be done is to determine whether that was really the conclusion. So, here, take the report. See, that was their conclusion. And so at the trial, you're going to have a conclusion of a distinguished law firm that there was no discrimination, and you say the plaintiff should not be able to go behind that.

MR. CHINN: Well, I would say the plaintiff through the discovery, the substantial discovery that's occurring in this case, will very much be able to go behind that. In other words, the plaintiff will be able to say, you know, Ropes & Gray's conclusion, whatever it was based on that I wasn't discriminated on, was incorrect and I'll tell you why.

THE COURT: You mean O'Melveny's conclusion, right?

MR. CHINN: Well, Ropes & Gray and O'Melveny's conclusion. In other words, Ropes & Gray, I mean I did mean to say Ropes & Gray, but Ropes & Gray based on the information it received from O'Melveny, which I believe when Mr. Malt testifies and Mr. Montgomery testifies it will be described as confirmatory in nature, will say this was our conclusion and we

were helped in reaching this conclusion by an outside source.

But, you know, we're going to put on -- Ms. Martone will put on a case of why she thinks that the evidence relied on, the objective data, the testimony about her interactions with other partners, she will put or at least has had the opportunity to take substantial and ongoing discovery about the bona fides there.

And Ropes & Gray will not say to the jury, you know, look, forget about the underlying facts, we didn't discriminate against her because somebody said so. This is really more of a timing issue, your Honor. And, frankly, in plaintiff's papers, they're more focused on the retaliation claim, which I think is interesting here, than they are on the discrimination claim because that's really the context in which this comes up. We disagree about the way in which it comes up in the context of the retaliation claim.

THE COURT: It really comes up in both contexts though because you can't unring the bell with respect to the underlying claim of discrimination because you have a report that says no discrimination. I realize that the plaintiff in the plaintiff's papers on the current motion places more stress on the issue of retaliation because retaliation is a subjective claim. So, what was in the minds of the Ropes & Gray people when they made their decision is very much at issue, and so there's a distinction between Erie and objective considerations

and retaliation and subjective consideration. You know, I get that. There's still the other part.

And you say both parties will argue out the ultimate merits of whether there was or was not discrimination. But, the jury will still hear that there was this independent investigation which Ropes & Gray went to the trouble and expense of getting done in order to assure itself that there was no merit to these claims; and this independent investigation concluded that there was no merit to these claims and so it was able to go forward with its previously determined position to fire the plaintiff, to terminate the plaintiff. And so Ropes & Gray will have the oath helper, so to speak, of this independent investigation.

MR. CHINN: Well, I agree with what you've just described in terms of Ropes & Gray's what I would call extrajudicial use of this information, that is, Ropes & Gray was on this path of asking Ms. Martone to leave and, while on this path, essentially this path was interrupted by a very serious assertion. Ropes & Gray felt that it had to interrupt, essentially, the direction in which it was going and examine that assertion, and it did so in the way you just described.

But, as I've said before, I don't believe it is Ropes & Gray's intent to say to the jury -- I mean in some sense it's like a hearsay analysis, right. We're not offering the report to prove there was no discrimination. We're offering the

report more for the purpose of saying, look, we were on this path, we were going to do this or at least we were moving in this direction, and we stopped for this period of time in 2010. When that came to a conclusion and we received the result that we received from O'Melveny & Myers, we then proceeded onward. And I think that's the fashion in which it has been both pleaded by the plaintiff and answered by Ropes & Gray in this case.

I think what you're asking is, but aren't you going to try at trial to bolster, to sort of say but you can really trust us on this one because there's this other law firm and our trial strategy is to say we were right about the discrimination because we had a third party, a neutral third party conclude in that fashion.

As I've said, I think it's our intent to prove the existence of a legitimate or a legitimate nondiscriminatory bases for our reasons by reference to the evidence of those nondiscriminatory legitimate bases. Ms. Martone, of course, will be free to assert they are pretextual and there is in fact evidence of discrimination. We don't believe that to be the case, but that's what the litigation is for.

With respect to the retaliation claim, I mean I think it's important, there were no retaliation claims advanced or that was not the subject of the report that was done by O'Melveny.

THE COURT: Right, because there had been no adverse action taken yet.

MR. CHINN: Exactly. There's no attempt -- well, I think Ms. Martone might disagree with what you just said.

THE COURT: Right, her work was being cut back, so.

MR. CHINN: I don't think there's any claim that there was an earlier complaint of discrimination that could have prompted those earlier actions that Ms. Martone is complaining of. So, then I don't think there's any dispute. The subject of retaliation was not what O'Melveny & Myers was hired to examine and they didn't. And there was no statement by Mr. Malt regarding retaliation to Ms. Martone in the meeting we've talked about.

And in fact, frankly, from a business perspective it was important to O'Melveny & Myers to examine this question, but from a legal perspective Ms. Martone does not have to prove the bona fides of her discrimination claim to prevail on her retaliation claim.

THE COURT: Just needs a good faith belief.

MR. CHINN: She just has to actually have complained and have a good faith belief with respect to that complaint. Her June 10 memorandum says what it says. There's nothing we can do to run away from that memorandum. She accuses the firm of discrimination there.

But at the end of the day, whether her discrimination

complaint was a valid one or not a valid one will not in any way be determined by a report received from O'Melveny about the underlying discrimination claims. That's not -- she doesn't have that burden nor do we.

THE COURT: Of course, if the report was really not a good report, if it were in any way slanted, biased, not independent, then she could make an argument that the report was in fact pretext and that the people who received the report really had every reason not to believe it. And when they say that they terminated her for completely nondiscriminatory reasons and they had the report that eliminated any claim of discrimination, if the report was not a good, independent, unbiased report, they would have an argument that would support their argument of pretext for retaliation, a subjective state of mind.

MR. CHINN: Your Honor.

THE COURT: I'm not saying, obviously, I'm not impugning the O'Melveny report at all. I have no basis to do that. The only issue is whether the plaintiff should have an opportunity to, as the cases say, plumb the validity of the report and plumb what the people who got it thought of it, knew about it, how did they participate in it.

But you touch on an important issue which is really not developed much in the papers which is the scope of possible discovery relating to the report and what went into the report.

And I realize that the papers were produced promptly over time. They were produced, for example, before a privilege log had been produced, which now has been produced.

And it would be, and I'll talk to you more about this later, but it would be wrong to promote a trial within a trial with respect to the O'Melveny report, depending upon how it's used. And if it's not going to be turned into a trial within a trial on the O'Melveny report, then, you know, discovery should be proportional to what it is that's being sought and what the importance of that is to the case.

And in your papers you really effectively say that you're prepared to give some discovery with respect to the O'Melveny report, such as the O'Melveny report itself, but you draw a line at letting the plaintiff have sufficient information in order to discredit the report. And you say now that, you know, you're willing to look at the report much like hearsay, not being admitted for the truth.

Of course, that argument is not made in the papers, but it's also hard to see what the instruction would be with respect to the O'Melveny report that would be an adequate instruction because Ropes & Gray comes into this motion wanting, wanting the good parts of the report, wanting the jury to appreciate that it went the last mile. It wasn't enough for Ropes & Gray simply to investigate the allegations itself and conclude no discrimination. It hired an outside firm to

conclude no discrimination. It waited to make its final decision until that report was issued. That leaves open -- you say, oh, at trial, we're not going to try to say believe the O'Melveny report. The way in which you described what you're going to say at trial makes the O'Melveny report fairly important.

Now, I believe that the federal rules mean what they say with respect to proportionality, and I don't think that the O'Melveny report should begin an entire new litigation. But, in fairness, the plaintiff should have some opportunity to be able to respond proportionately to the O'Melveny report. Of course, I'll decide the motion in a few moments. I want to make sure I understand everything that you have to tell me.

MR. CHINN: Well, in the plaintiff's initial moving papers the plaintiff seeks, although it's I think just listed as four categories in the way it's described at pages one or two or three at the very beginning of their moving brief, but I count more like nine categories of document discovery before we get to depositions that are being sought here.

The first is the investigation report itself. Of course, as you know, we've distinguished the conclusions from the facts and we've relied on a number of cases including the Bruss case for that sort of distinction, but that's one item.

The second item that were separately produced by O'Melveny is an executive summary of the report. You know, at

the end of the day I don't know that there's a great deal of dispute with respect to the conclusions from our perspective in the investigative report itself or in the executive summary, which I think are very similar.

Then the next category is drafts of the investigation report. Ms. Vladeck noted that there was a draft of the investigative report provided to O'Melveny and then it was, quote, finalized -- I'm sorry, to Ropes -- and it was finalized a few weeks later and that presumably there was a lot of input into its content in between those two points in time from Ropes to O'Melveny. And I don't think there's any indication of that whatsoever on the privilege log, in other words, that there was some kind of, you know, extensive communications or drafts or what have you that went from Ropes back to O'Melveny of this. And we would maintain our objection to producing that, those drafts. I think the executive summary, I think, piece actually went through more drafts than the actual investigation report itself.

Communications regarding the drafts, I mean there are communications between O'Melveny and its client, Ropes & Gray. There are communications within Ropes & Gray among its management and its in-house counsel regarding the report. We don't believe that just because the report is -- there are facts about this report have been put into issue to some degree here. We do not believe that results in a waiver of all the

communications with respect to all the communications about the report or about the investigation. Communications between O'Melveny & Myers and Ropes regarding the investigation, I mean there are different -- I mean some of the communications between O'Melveny and Ropes & Gray are fairly -- I should say, looking for the word -- administrative or logistical in nature. But some of them may well constitute legal advice or opinion, work product, and we would take the view that those should not be divulged.

The pre-investigation communications between outside counsel and defendant, another category they're seeking. I mean there's a retention letter. We think that's a privileged document. We would object to that.

O'Melveny's notes regarding the investigation, those are not in Ropes & Gray's actual custody and control. While Ms. Martone might argue -- and this really didn't get fleshed out in the papers -- that we could instruct O'Melveny in that regard, I think that the law in New York on that in Stage Realty v. Proskauer, their notes are actually theirs. They're not ours. And, again, we would oppose the production of those.

Documents in Ms. Patrick's custody or control relating to the discrimination complaint and investigation, there are a few categories here. One category has been produced in full to Ms. Martone. Ms. Patrick had a number of communications directly with Ms. Martone. All of those have been produced.

Another category though is Ms. Patrick's communications with O'Melveny, which I've already alluded to. We believe those, many of those are privileged communications and constitute, at least some may constitute opinion, work product. Some will be more administrative in nature, like I said. But, more importantly, Ms. Patrick had internal communications within Ropes & Gray, as she set forth in her declaration, in which she functioned as counsel to the firm. She rendered advice on how the investigation should be conducted, in terms of who should conduct it. She rendered advice in terms of issues that came up during the course of the investigation and how they should be addressed.

And, finally, the last category of documents sought is documents in the possession, custody or control of Mr. Mendel, who there is no dispute between the parties -- there is some attempt to attack whether Ms. Patrick acted in a business capacity by Ms. Martone, but there is no dispute that Mr. Mendel serves on as a regular basis as in-house counsel for employment and employment-type issues to the firm. And we don't believe there's been any showing by the plaintiff that would require his communication on this subject to be produced.

So I don't mean to go on at length here, but those were the categories when you break them into items that were sought by the plaintiff. And while I understand what you've said, your Honor, and while we understand the cases that there

has to be some level of fairness here, we believe that many of these categories go well beyond what fairness would require in this regard.

And, in closing, I just wanted to go back to something you said a moment ago. I hear that you seem dubious of the proposition that Ropes & Gray intends to prove its legitimate nondiscriminatory basis for action here based on the facts.

THE COURT: Oh, no, I don't doubt that. No, no. I mean I don't for a moment doubt that Ropes & Gray would give up its opportunity to prove at trial that there was no discrimination and that Ropes & Gray would attempt to do that on the underlying evidence that Ropes & Gray contends shows no discrimination.

What I said was Ropes & Gray does not forswear the ability to have the good parts of the investigation there before the jury. In fact, it's integrally related with the position of Ropes & Gray as expressed in the papers and at argument. Ropes & Gray uses the investigation to bolster its position and does it in a way which, you know, I'm not faulting. Ropes & Gray says here's what happened. We had an independent investigation and we wouldn't act before we had an independent investigation tell us that there was no discrimination. And when we heard that there was no discrimination, based upon this investigation by a distinguished outside firm, we could then proceed. We could

proceed to terminate the plaintiff. And we were not retaliating against her from the allegations that were out there and caused the investigation, but --

MR. CHINN: Your Honor, with all due respect, I think that, look, I can certainly hear everything you're saying up to the final point. I do think our emphasis is a bit different, but I can understand how you would describe it that way. But that there was therefore no retaliation, I don't think that's -- I mean the point of explaining the chronology is not to say, we're not saying that that proves that there's an absence of any retaliatory motive. What we're saying is that explains the timing of Ropes & Gray's actions.

In other words, we were heading down this path. I mean there were a lot of criticisms that had come to the attention of the firm's management, a lot of concerns that had been developing over some period of time. Certain actions had already been taken with respect to Ms. Martone in prior years.

THE COURT: Let me just ask you this. I've said I don't have any information before me to impugn O'Melveny, a large firm with a good reputation. I have no information to suggest that the report was anything other than a stellar piece of work, but I doubt the plaintiff agrees with that.

The plaintiff's contention that there was discrimination, of necessity, requires the plaintiff to say the O'Melveny report was just wrong. If the O'Melveny report was

wrong and if the people at Ropes & Gray who commissioned it worked with the O'Melveny people in connection with the report, had communications with them, reviewed drafts, if they came to the conclusion that for whatever reason O'Melveny was coming up with a conclusion that was not correct and they knew it, the Ropes & Gray people -- I'm not suggesting this is right but that's why we have discovery and why we have trials -- shouldn't the plaintiff at least be able to explore whether the people at Ropes & Gray didn't believe the O'Melveny report and that the O'Melveny report was in fact simply another piece that they were using in a pretextual effort to hide the true reasons for the termination?

Again, I have two sides before me. I have the plaintiff; I have the defendant. Of necessity you have different conclusions about the O'Melveny report and whether it's true. It has to be, right?

MR. CHINN: I think this is far more fundamental than that, but I know you disagree with me and I don't mean to repeat myself. We have a disagreement as to the reason she was asked to leave the firm, and that is the principal disagreement here. And if Ms. Martone disagrees with our conclusion, that is, Ropes & Gray's conclusion that she was not discriminated against and O'Melveny's conclusion that she was not discriminated against, she has been given very significant access to the evidence from which she can make the arguments to

persuade the jury that.

And that's really our position, your Honor, is the case is really about the facts. It's not about at the end of the day what O'Melveny said. From our perspective, we're not relying on O'Melveny to say there was no -- there was an absence of retaliatory animus. It's really to say, look, this is what we were doing and we stopped on that path and went on to another one for a period of time. It's factually what happened, as you pointed out, and we spoke about this two months ago, we can't get away from that. It is what happened. We can't sort of just make up facts to fill that in.

But at the end of the day, that is not going to be -- we're going to try this case. We're going to litigate this case based on what the objective data regarding Ms. Martone's performance, what they were, what individuals said or believed about Ms. Martone, other partners in the firm, and the way she interacted with them.

And, you know, if Ms. Martone is cross-examining these people or deposing them and will be able to cross-examine them and say it was really your fault, not mine, that we had this conflict, she's perfectly capable of doing these kinds of things or attacking the data and saying this data doesn't take into account my contributions in another way or what have you. All the sorts of ways that one attacks and tries to prove pretext, she can do all of that and have nothing to do with

what O'Melveny said at the end of the day. And from our perspective, it doesn't either. And it is the story that we hired a prestigious law firm to do this. And to say what we're going to do is come in here and say you can't find we discriminated against because we looked into it and somebody said we weren't.

And I mean I understand the fairness point, and that's why we have come with a concession. And maybe you will find that the lines should be drawn somewhere else. It certainly sounds as if that's the case. But I don't think at the end of the day the categories that are being sought here, I think a number of these categories -- and we haven't gotten to depositions yet. They just say we want to depose a bunch of people about this. I think that what they're seeking here goes far beyond what would be necessary even to do precisely what you're describing here.

THE COURT: Okay.

MS. VLADECK: Can I make just a few brief factual points, your Honor.

One, we didn't get a full privilege log. We just got a privilege log from Diane Patrick.

Moreover, the time period from when Ropes & Gray received the draft on September 23, 2010, to when it received the final on October 6, there are numerous entries that include emails from Malt, Montgomery, and McCabe, the two heads of the

firm and the head of the practice group.

And, finally, with respect to what was said, I think it's just getting somewhat truncated, but Mr. Malt did not put in an affidavit saying that anything Ms. Martone said was erroneous. And he makes it very clear that they had decided to terminate her employment after reviewing the report, which having the Patrick privilege log shows all occurred in the same day.

THE COURT: All right. Let me decide the motion that's before me and then we'll proceed with some discovery issues.

The plaintiff, Patricia Martone, brings this motion to compel the defendant, Ropes & Gray, to produce the report, drafts, notes, and communications related to an investigation conducted by outside counsel O'Melveny & Myers into the plaintiff's claim that she was the victim of age and gender discrimination.

The facts relevant to this motion are as follows. The plaintiff is a female attorney who was terminated from her position as a partner at Ropes & Gray in 2010. Ropes & Gray will also be referred to as "the firm" or "the defendant." At the time of bringing this action, the plaintiff was 63 years old. The plaintiff alleges that the defendant discriminated against her on the basis of age and gender by stripping her of work-related responsibilities, which resulted in a decline in

her law practice. The plaintiff also alleges that the defendant terminated her in retaliation for complaining about this discrimination.

In June 2010, the plaintiff complained about gender discrimination by writing a letter to the chair of the firm, R. Bradford Malt, and the managing partner of the firm, John Montgomery, which asserted that the firm had discriminated against her on the basis of age and gender. (Martone declaration paragraph 2.) The plaintiff requested that the firm conduct an investigation into her complaint and share the results of the investigation with her. The firm retained outside counsel, the law firm of O'Melveny & Myers LLP, to conduct an investigation into the plaintiff's complaint of discrimination. (Martone declaration paragraphs 3 and 4.)

In October 2010, Malt sent an email to the plaintiff requesting a meeting with her. When the plaintiff asked what the purpose of the meeting was, Malt explained that it was intended to follow up her complaint of discrimination. At the meeting, Malt and Montgomery fired the plaintiff. According to the plaintiff, they told her that the investigation had concluded that the decline in the plaintiff's practice was not a result of discrimination and could plausibly be attributed to factors other than discrimination. The plaintiff also asserts that they told her that they only decided to fire her after reviewing the investigation report prepared by O'Melveny, which

led them to conclude that the economics of the plaintiff's practice were unsustainable. The plaintiff requested a copy of the investigation report and was told that obtaining a copy might not be possible but that she should contact Diane Patrick, the firm's partner responsible for diversity. (Martone declaration paragraphs 8 through 10.)

In the plaintiff's first request for production of documents, dated June 10, 2011, the plaintiff sought production of the investigation report, as well as all drafts of the report and communications and notes regarding these drafts and the investigation, that are in the possession of the defendant. The defendant has refused to produce these documents claiming that they are protected by the attorney-client privilege and the work product doctrine. The plaintiff now moves to compel production of these documents.

Federal Rule of Civil Procedure 26(b)(1) provides that: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense...Relevant information need not be admissible at the trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence." Federal Rule of Civil Procedure 26(b)(1). Neither party disputes that the information sought by the plaintiff is relevant to this case. However, the parties dispute whether the information in question is protected by the attorney-client privilege or the

work product doctrine, whether any such privilege has been waived, and the scope of any potential waiver.

The attorney-client privilege protects from disclosure confidential communications between a client and attorney for the purpose of obtaining or providing legal advice. United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011). The work product doctrine provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial. In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 183 (2d Cir. 2007). For both the attorney-client privilege and the work product doctrine, the party seeking to shield the information bears the burden of establishing that the privilege or the doctrine applies. See Mejia, 655 F.3d at 132, (attorney-client privilege); In re Grand Jury Subpoenas Dated March 19, 2002, and August 2, 2002, 318 F.3d 379, 384 (2d Cir. 2003)(work product doctrine).

As an initial matter, the plaintiff asserts that the defendant failed to meet its burden of establishing that the documents in question are privileged or protected work product. This argument was based largely on the fact that the defendant had not yet produced a privilege log as required by Local Rule 26.2. Subsequently, the defendant informed the Court by letter dated October 18, 2011, that the privilege log had been produced to the plaintiff. The plaintiff now says that the privilege log that was provided covered only the files of

Ms. Patrick. There has been no development of this issue since it was only raised at argument. If the resolution of this dispute turned solely on the applicability of the attorney-client privilege and the work product doctrine, the Court would refer the matter to the magistrate judge for an examination of the privilege log and, as necessary, for the underlying documents and for any further proceedings. However, this is unnecessary because, even if any such privilege applies, the defendant has waived it by placing the results of the investigation "at issue" in this litigation.

The attorney-client privilege and work product doctrine may be waived when a party asserts a claim or defense that places privileged communications "at issue" in the litigation. "At issue" waiver stems from the principle that the "attorney-client privilege cannot at once be used as a shield and a sword." United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991); see also In re Von Bulow, 828 F.2d 94, 103 (2d Cir. 1987). "Thus, the privilege may implicitly be waived when a defendant asserts a claim that in fairness requires examination of protected communications," Bilzerian 926 F.2d at 1292, or "places a document in issue through some affirmative act intended to inure to that party's benefit," Granite Partners v. Bear, Stearns & Co., Inc., 184 F.R.D. 49, 55 (S.D.N.Y. 1999).

The Second Circuit Court of Appeals has recently

clarified that "at issue" waiver does not arise whenever a party makes protected information "relevant to the case" but rather only where that party "relies on privileged advice from his counsel to make his claim or defense." In re County of Erie, 546 F.3d 222, 229 (2d Cir. 2008). The Court of Appeals added: "We decline to specify or speculate as to what degree of reliance is required because petitioners here do not rely upon the advice of counsel in the assertion of their defense in this action." Id. The work product doctrine may also be waived when the protected document has been placed at issue. See John Doe Co. v. United States, 350 F.3d 299, 302 (2d Cir. 2003); Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A., 258 F.R.D. 95, 106-07 (S.D.N.Y. 2009). The party asserting the privilege has the burden of showing that it has not been waived. See Bank of America, N.A. v. Terra Nova Insurance Company, 212 F.R.D. 166, 169 (S.D.N.Y. 2002).

Here, the defendant has taken or expressed its intention to take several affirmative acts that place the results of the investigation at issue. First, it is undisputed that the chair and managing partner of the firm told the plaintiff that the investigation had found no basis for her allegations of discrimination and then proceeded to terminate her employment. (Martone declaration paragraph 9 and 11.) Second, the defendant asserts in its papers in connection with this motion that if the investigation had revealed evidence of

discrimination, the defendant may not have terminated the plaintiff. (Defendant's memorandum at 6.) Third, the defendant referred to the investigation in its answer to the plaintiff's amended complaint stating that the firm chair and managing partner told the plaintiff "that the investigation report from O'Melveny & Myers had concluded that the decline of plaintiff's practice was not due to discrimination and could be attributed to factors other than discrimination." (Answer to amended complaint paragraph 99.) Finally, in its motion papers, the defendant makes clear that it plans to introduce evidence relating to the investigation at trial. In particular, it intends to refer to the substance of the conversation with the plaintiff upon her termination where she was told that the investigation had concluded that no discrimination occurred. (Defendant's memo at 6-7.)

Indeed, in the course of argument on the current motion, defense counsel made it clear that the hiring of O'Melveny & Myers and the receipt of the O'Melveny & Myers report is part of the evidence that the defendant would introduce at trial. Indeed, it is difficult to see how the defendant could not describe the investigative results at trial. The termination interview with the plaintiff is a critical event in the evidence. The defendant referred to the results of the investigation to reject the plaintiff's claim of discrimination at that interview, and the defendant has

conceded that this finding freed it to proceed with terminating the plaintiff. The defendant thus relied on the results of the investigation in rejecting the plaintiff's claim of discrimination which she is making in this case and intends to refer to the results of the investigation at trial as part of its explanation as to why it could terminate the plaintiff.

The defendant, however, argues that these actions do not give rise to an at issue waiver because it is not relying on a defense of advice of counsel and, indeed, advice of counsel could not justify discrimination if it had in fact occurred. Nor, the defendant contends, is it relying on an affirmative defense based on its conduct of a reasonable and thorough internal investigation such as the Faragher/Ellerth affirmative defense. Instead, the defendant asserts as a factual matter that no discrimination took place and that it will establish this independently, without relying on the results of the investigation. The defendant thus contends that this case should be distinguished from those cases imposing waiver where a party formally invoked the advice of counsel defense, see, for example, In re Buspirone Patent Litigation, 210 F.R.D. 43, 53 (S.D.N.Y. 2002), or where a party relied on the Faragher/Ellerth affirmative defense, see, for example, Angelone v. Xerox Corp., No. 09 Civ 6019, 2011 Westlaw 4473534 at *2-3 (W.D.N.Y. September 26, 2011), Pray v. New York City Ballet Co., No. 96 Civ 5723, 1997 Westlaw 266980 at *1

(S.D.N.Y. May 19, 1997).

The defendant contends that this case is more analogous to those where waiver was not imposed because the party in question had not sufficiently relied on the advice of counsel in asserting the claim or defense. In particular, the defendant points to the Court of Appeals' decision in In re County of Erie, where the court held that a "mere indication of a claim or defense certainly is insufficient to place legal advice at issue" and that, instead, "a party must rely on privileged advice from his counsel to make his claim or defense." 546 F.3d at 229. The defendant claims that because it is not squarely invoking an advice of counsel defense or raising a Faragher/Ellerth affirmative defense, it cannot be said to have relied on privileged advice from counsel so as to effect a waiver.

Yet, the case law does not define reliance as narrowly as the defendant would suggest in its papers. See, for example, Bodega Investments, LLC v. United States, No. 08 Civ 4065, 2009 Westlaw 2634765 at *3 (S.D.N.Y. August 21, 2009)(privilege can be waived "irrespective of whether plaintiff was invoking an advice-of-counsel argument"); Kingsway Financial Services, Inc., v. Pricewaterhouse-Coopers LLP, No. 03 Civ 5560, 2008 Westlaw 5423316 at *11 (S.D.N.Y. December 31, 2008)("Although waiver pursuant to the at issue doctrine is most commonly found when a party asserts an advice

of counsel defense,...fairness considerations may also come into play where the party asserting the privilege makes factual assertions, the truthfulness of which may be assessed only by an examination of the privileged communications or documents." (internal quotation marks and citations omitted). In Erie, the Court of Appeals expressly declined to specify or speculate as to what degree of reliance is required for waiver, given that the petitioners in that case had relied only on a qualified immunity defense, which, because it is an objective and not a subjective test, rendered any legal advice...by counsel irrelevant. 546 F.3d at 229.

Here, in contrast, the plaintiff's retaliation claim requires an inquiry as to the subjective motivation and underlying reasons the defendant possessed for its decision to terminate the plaintiff. In addition, the defendant has admitted that it relied on the advice of counsel in making the decision to terminate the plaintiff when it did, at least to the extent that it may not have terminated the plaintiff had its counsel's conclusions in the investigation been different. This case thus presents a much closer nexus between the advice of counsel and the claims and defenses at issue in the litigation than did Erie. See Bodega Investments, 2009 Westlaw 2634765 at *2 ("There is no question, unlike in Erie, that we are required to determine a state of mind and also that the state of mind was potentially influenced by advice rendered by

the attorney. Hence, at issue waiver for such advice is appropriately triggered, since access to that advice is vital to assessing plaintiff's claim..." (internal quotation marks omitted)).

Moreover, regardless of whether the defendant intends to formally invoke an advice of counsel defense, the defendant admits that testimony about the investigation's conclusions -- namely, that no discrimination occurred -- will be presented to the jury at trial. Indeed, it is difficult to imagine that the substance of the conversation with the plaintiff informing her of the investigation's conclusions that no discrimination had occurred would not be introduced at trial. Moreover, at argument the defendant appears to concede that the history of the investigation and the reasons for the investigation will be part of the testimony of the Ropes & Gray witnesses at trial. Thus, the existence of the investigation and its conclusions which are favorable to the defendant and completely contrary to the plaintiff's claim of discrimination will be before the jury in this case.

This is precisely the type of situation where courts have found that fairness compels waiver of the attorney-client privilege and work product doctrine so that the opposing party can challenge the conclusion of counsel by showing that it is biased, incomplete, or unfounded. As the Court of Appeals for the Second Circuit has noted, "the unfairness courts have found

which justified imposing involuntary forfeiture generally resulted from a party's advancing a claim to a court or a jury while relying on its privilege to withhold from a litigation adversary materials that the adversary might need to effectively contest or impeach the claim." John Doe Co., 350 F.3d at 303; see also Business Integration Services, Inc. v. AT&T Corp., No. 06 Civ 1863, 2008 Westlaw 318343 at *1, (S.D.N.Y. February 4, 2008)("Based on considerations of fairness, an at issue waiver can occur in situations where a party makes assertions in litigation while relying on its privilege to withhold...materials that an adversary might need to effectively contest or impeach the claim."). In John Doe, the Court of Appeals concluded that the defendant corporation had not waived the privilege by sending a letter asserting its good faith belief in the lawfulness of its conduct to a United States Attorney. Id. at 306-07. The court distinguished that situation where disclosure had been only to an adversary from one where the defendant intended to offer testimony at trial, explaining that: "The government is in no way worse off as the result of its receipt of Doe's letter...It does not run the risk that some independent decision-maker will accept Doe's representations without the government having adequate opportunity to rebut them." Id. at 305.

Here, in contrast, the defendant has not only disclosed the conclusions of the report to the plaintiff, it

did so under circumstances where the results became part of a critical meeting as to which there will be testimony at trial, and it also intends to put these conclusions before the jury. Fairness dictates that the defendant not be permitted to do so without allowing the plaintiff to access materials enabling her to rebut the contentions before the jury. See, for example, Bilzerian, 926 F.3d at 1294 (defendant who proposed to testify about his good faith belief in the legality of his conduct waived privilege for communications because "the jury would be entitled to know the basis of his understanding that his actions were legal"); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 488 (S.D.N.Y. 1993)(a party may waive the privilege "if he asserts a factual claim, the truth of which can only be assessed by examination of a privileged communication"); Trudeau v. New York State Consumer Protection Board, 237 F.R.D. 325, 340 (N.D.N.Y. 2006)("Where a party contends facts to an adjudicating authority...and then relies upon the privilege to deprive its adversary of access to the material that might disprove, impeach, effectively contest, rebut or undermine the party's contention, such would be unfair." (internal quotation marks and citations omitted)).

Thus, because the defendant will refer to the investigation's conclusions at trial, which conclusions directly contradict the plaintiff's discrimination claim, the plaintiff should have the opportunity to examine materials that

would enable her to impeach or rebut those conclusions. Otherwise, the weight of the investigation's conclusion that there was no discrimination would be before the jury and would go unrefuted. Such a result cannot be squared with the considerations of fairness to the party's adversary, see John Doe, 350 F.3d at 302, which constitute the underlying rationale for the at issue waiver. Moreover, if the results of the investigation were in fact unfounded and the parties who received those results at Ropes & Gray knew them to be so, that would certainly affect the plaintiff's ability to prove its case of retaliation against the defendant. Accordingly, the defendant has waived the attorney-client privilege and the work product doctrine by placing the results of the investigation at issue in this litigation.

The defendant argues that even if the privileges are deemed waived or forfeited as to some documents related to the investigation, such waiver could only extend to the executive summary of the investigation report detailing the investigation's conclusions and should not include drafts of the report or notes and communications concerning the investigation. However, for the same reasons that fairness requires waiver of the privilege, it also requires disclosure of the entire investigation report and drafts thereof, as well as notes and communications in connection with the investigation in the possession of Ropes & Gray. Without the

opportunity to examine these documents, the plaintiff would have no ability to rebut the report's conclusions by, for example, demonstrating that O'Melveny did not consider all of the relevant evidence or drew erroneous conclusions from the evidence it considered. As a result, the weight of the investigation's conclusion that no discrimination occurred would remain before the jury unrefuted, which would be contrary to the principles of fairness that require waiver in the first place. The limit of fairness is not to show that at the meeting the Ropes & Gray partners accurately reflected the conclusion of the investigative report. Fairness requires an exploration of whether that conclusion was a conclusion that can be impeached.

Indeed, the fairness doctrine typically demands that "testimony as to part of a privileged communication requires production of the remainder," Von Bulow, 828 F.2d at 102, and courts have required disclosure of not only investigation reports but also related materials when such disclosure was necessary to enable the party to rebut contentions advanced by the party asserting the privilege, see, for example, Angelone, 2011 Westlaw 4473534 at *2 (privilege waived not only for investigation report itself but also "for any document or communication considered, prepared, reviewed or relied upon by the company in creating or issuing the report" to allow plaintiff to rebut the contention that defendant conducted the

investigation thoroughly); Pray, 1997 Westlaw 266980 at *1-2 (initial communications and other information connected to investigation discoverable to allow plaintiff to rebut contention that investigation was conducted reasonably). Here, the plaintiff cannot effectively contest the investigation report's conclusion that there was no discrimination without access to underlying materials.

The defendant attempts to avoid this conclusion by reiterating its assertion that it is not relying on the investigation to prove its defenses and, therefore, the plaintiff does not require access to documents exploring how the investigation was conducted and the bases for its conclusions. However, as discussed above, the argument that the defendant is not relying on the investigation is unpersuasive. The defendant also cites a line of cases concluding that disclosure of one privileged communication did not waive privilege as to undisclosed portions of that same communication or other related privilege documents. See, for example, Von Bulow, 828 F.2d at 102; Sullivan v. Warminster Township, 274 F.R.D. 147, 154 (E.D. Pa. 2011); In re Vioxx Products Liability Litigation, No. MDL 1657, 2007 Westlaw 854251 at *6 (E.D. La March 6, 2007). However, these cases are inapposite because they involve situations where waiver was allegedly triggered by extrajudicial disclosure rather than by a party placing a privileged communication at issue. See, for

example, Von Bulow, 828 F.2d at 102 (extrajudicial disclosure through book publication); Sullivan, 274 F.R.D. at 154 (extrajudicial disclosure of report to media before litigation had even begun); In re Vioxx, 2007 Westlaw 854251 at *6 (extrajudicial disclosure of report to media where withholding party had not cited, relied upon, or used the report offensively in the litigation). In Von Bulow, the Second Circuit Court of Appeals explicitly distinguished between extrajudicial disclosure and at issue waiver in concluding that publication of excerpts of communications with a client did not require disclosure of the unpublished portions of these communications.

Because the defendant here has stated that it will place evidence related to the investigation's conclusions before the jury, this is not an instance of extrajudicial disclosure for which the scope of the resulting waiver should be limited. Instead, fairness requires that the plaintiff have access to the drafts, notes, and communications concerning the investigation in the possession of Ropes & Gray so that she will have an opportunity to challenge the conclusions of the investigation that will be before the jury.

This is also not a case like Seyler v. T-Systems, 771 F. Supp. 2d at 284, (S.D.N.Y. 2011), also relied on by the defendant. In that case, a single email was produced, although the producing party did not know the email reflected a

privileged communication. No waiver was found because the producing party represented it would not use the email.

Thus, the plaintiff's motion to compel disclosure of the investigative report and related drafts, notes, and communications in the possession of Ropes & Gray is granted. The Court notes that the request for production at this point concerns documents in the possession of Ropes & Gray. It is not a fishing expedition into the files of O'Melveny. If the only affirmative use of the investigation will be limited by Ropes & Gray, then the discovery to impeach its conclusions should also be appropriately focused. See Federal Rule of Civil Procedure 26(b)(2)(C). The Court also notes that there may be limits that could be placed on these disclosures based on the need for certain materials or the need for proportionality in discovery. However, at this point, the defendant has not suggested any such limits or pointed the Court to the burden of producing various kinds of material which might outweigh the role of the O'Melveny investigation in this case. The Court does not foreclose the possibility that some limits would be required in the future, depending upon the volume of the materials sought by the plaintiff and the remoteness of those materials to the issues in this case, but those limits have not been suggested to the Court at this point.

The Court has considered all of the arguments of the

parties. To the extent not specifically addressed above, the remaining arguments are either moot or without merit. For the reasons explained above, the plaintiff's motion to compel is granted. The clerk is directed to close docket No. 17.

All right. Now, I said I would take up some discovery issues with you because I've been reading with interest the correspondence that you've sent to me. It's distressing.

Let me just make some observations in connection with the O'Melveny investigation. In the course of the argument and in the course of the decision, I indicated that there should be limits based on proportionality and the role of the O'Melveny investigation at the trial. It's clear to me listening to the parties that the defendant is placing before the jury the O'Melveny investigation and the plaintiff, therefore, should have a reasonable opportunity to respond to that and to explain to the jury why they shouldn't credit the O'Melveny investigation, and it's part of the evidence that defendant wishes to introduce.

At the same time, the defendant says it's not going to rely so much on the O'Melveny investigation and it's going to prove no discrimination and plaintiff is going to attempt to prove discrimination and the defendant says no retaliation and the plaintiff will attempt to prove retaliation. There will obviously be limits in terms of time that you all are given for trial and you all are preparing the case to try it or to settle

it. And from what I've heard, no one intends to spend a lot of time on having a trial within a trial on the O'Melveny investigation.

But, at the same time, it would appear to me -- and this is not fully briefed before me -- but the most critical parts of the O'Melveny investigation would be the O'Melveny report, the drafts of the executive summary, the drafts of the report, and was there any interference in the course of preparing the report to suggest that the report was not an independent report. So, those are important materials.

But is it necessary to redo all of the O'Melveny interviews and to get the O'Melveny lawyers in as to what they did and how they conducted the interviews? I haven't been persuaded on that by the papers. And I expect that the parties will conduct the litigation with a sufficient awareness of getting the case ready for settlement or trial and with a view toward what reasonable documents, for example, could be presented at trial. It's not going to be thousands. And I don't expect that the lawyers are going to be seeking through haystacks to find missing needles.

And I expect the discovery to be proportional to what's at stake, including with respect to the individual issues, which then leads me to the next issue. Having read the discovery correspondence, there are certain obviously critical pieces of information to which, for example, the plaintiff is

entitled. The plaintiff is entitled to evidence about what happened to allegedly similar comparators, and the fact that this is sensitive information that the defendants don't want to produce is not an argument that the plaintiff, under the cases, has no ability to show that she was treated differently from allegedly similarly situated people.

Obviously, this is not all developed in the papers. All I have is the plaintiff's request, okay, let us make a motion to compel. And the defendant says no, it's not ripe yet, we can still talk about it. At the end of the day I would have thought that the parties are going to say to each other, hopefully, the judge is going to make us produce reasonable proportional discovery. We can decide between ourselves what is reasonable and proportional discovery. We don't have to come in and present ourselves to the Court and look unreasonable. And you would think to yourself that you -- both sides would say we don't want to present a dispute to the Court that we know we're going to lose on.

And if either side wants me to have another conference with you and with your clients to make that exact point, we'll have another conference. You're certainly welcome to get the transcript.

There's a confidentiality order in the case. If we need a stricter confidentiality order, we'll get a stricter confidentiality order. I don't know of any reason why what is

quintessentially important relevant evidence, not just peripheral evidence, but was the plaintiff treated the same way as others who are fair comparators -- now, there may be an issue about what are fair comparators and, okay, the parties can explain that to me. But at the end of the day, you know what the answer is going to be on that piece of discovery.

Second, there's a reference in the papers that the defendant has relied on the plaintiff's billing records in order to establish that the plaintiff was not a sufficient producer and that that was one of the reasons for the plaintiff's termination. But at least the papers say when asked for the billing records, the defendant says we're not going to give them to you because those reveal privileged material. That may not be, but it's just the allegation in the papers.

So, reasonable lawyers on both sides would say we can't rely on records that we don't give to the other side. We can work out some way to amend the records, redact the records to eliminate privileged material, if necessary. If you need a court order that says no waiver, this is required, you can get a court order. And that's the second thing that sort of jumps out from the correspondence.

The third thing that jumps out from the correspondence is sort of pattern discovery responses which say, you know, we object to this request for all of our general objections and

we'll look for the records and give you the reference if we find any and, you know, at the end of the day, after you've had your meet and confer, there will be an answer. Are there documents being sought that are really being objected to? If they're reasonable to be produced, if they're reasonable in terms of the issues, if they're proportional, then they're going to be produced. If they're burdensome, overbroad, not a general objection but a specific objection with respect to how burdensome individual documents are, then if they're not sufficiently important and if their value is outweighed by the burden of producing them, then they won't be produced.

And you all know that. You can exchange mail with each other in which you object to each other's discovery requests and you can have your meet and confer. I'm not going to say you can make a discovery motion at this point because I don't think that the issues have been sufficiently gelled. And I will have, if you tell me, Judge, we have some discovery issues which we can't resolve, I will attempt to decide them myself, not give them to the magistrate judge because I really want to find out. I want to have a better sense of who's being reasonable and who's not being reasonable.

I'm plainly going to have to decide other motions in this case. I think the credibility of lawyers is very important. And I think if I simply send this to the magistrate judge, which this correspondence is a plain invitation to do,

parties are more willing to make arguments before the magistrate judge than they are before me. It just happens. There may be a point where I send you to the magistrate judge, but if I do, that's not a good sign, not a good sign.

So, where do you go from here? Well, I've already indicated to you that there are some issues that seem to me that cry out for immediate resolution because we've talked about them before. Comparators is one. And if you have legitimate discovery disputes which you've been unable to work out, then you have to send me a letter laying out what the discovery disputes are and then there has to be a responsive letter and I will call you in for a conference to see if I can dispose of the discovery issues.

My obvious hope is that reasonable people will not be back before me on discovery disputes because between you, you should be able to know whether your respective positions are reasonable or not. And if the discovery sought is in fact reasonable and proportional, then it should be given. And if it's not, then it shouldn't be. And if you have a dispute, you can write me the letter and lay out the dispute, letter in response, and I'll call you in for a prompt conference.

Anything else that I can help you with today, specific issues?

MS. VLADECK: No, your Honor. Thank you.

MS. PLEVAN: Well, first of all, well, I think

Ms. Vladeck and I had a conversation the other day about timing of the discovery, and I think that is at least a ripe issue to bring to your attention that I don't see how we can possibly complete discovery in the time period that's been allotted. And I think the truncated or what has become a truncated time and the difficulty of witnesses being available -- we haven't been able to schedule the second day of Ms. Martone. In addition to our schedules, our clients are flying all over the world on business.

THE COURT: The parties haven't asked me for an extension of the discovery deadline in this case.

MS. VLADECK: That's correct.

MS. PLEVAN: We have not.

THE COURT: And I appreciate that. And I've assumed that you were acting cooperatively in an effort to conduct the discovery, finish the discovery in the time that you had originally undertaken to do it. And unlike some districts, I'm not so opposed to a first request for an extension of discovery when lawyers are acting reasonably with each other, so.

MS. PLEVAN: I mean I think we would like to talk further and make a proposal to you next week.

THE COURT: That's fine.

MS. PLEVAN: But there has been one day of Ms. Martone's deposition and four other depositions and a fifth that will take place next week that the plaintiff is taking.

And I think just to add to that, there have been tens of thousands of documents and emails produced in this case by the defendant.

And the only other point, I think we take to heart your comments and it is the reason that I said what I said in my letter that I didn't think this issue was ripe. We did have a challenge, do have a challenge in dealing with this comparator issue as to people who might have been candidates for departure or did depart the firm because -- I don't want to lay on our problems, but the people that are helping us at the firm are not privy to that information and we have not been in a position to actually obtain the information until a few days ago and now I think are in a position to formulate a more specific proposal which may or may not be, you know, something we can reach agreement on. But I think we will at least be able to make progress on that issue and, obviously, we'll keep talking about the other issues as well.

THE COURT: Is this a case where you're going to have expert discovery?

MS. PLEVAN: I don't think so, your Honor.

MS. VLADECK: I don't think so either, your Honor.

THE COURT: Wonderful. Do you have any idea about what your thoughts are about the -- I don't want to ask you to commit to the discovery cutoff now. The fact that you don't have to factor in expert discovery is very useful.

MS. PLEVAN: Well, it will mean we don't have to have additional time for that.

THE COURT: Right.

MS. PLEVAN: And we haven't talked at all about a specific time frame, and I think I need to consult with our folks too. We're basically December 15 is the date now and extending it, you know, the rest of December is not likely to help us advance much in this deposition schedule.

THE COURT: I understand. And, you know, if it's December 15, I wouldn't say, gee, you've got to finish it by the end of December or even January 15. I mean I want to be --

MS. PLEVAN: I was going to say I know in particular that one of the depositions that we are having a lot of difficulty scheduling is Mr. Malt, and the first two weeks in January are I know for sure impossible for him as well as the last two weeks in December because that's their compensation period. So we were fortunate to be able to get Mr. Montgomery in next week. But I really need to find out more about -- so I think it would at least be the end of January, but I need to find out for sure that he's not in Hong Kong that week, so.

THE COURT: Okay. Is this a case where there are going to be any dispositive motions?

MS. PLEVAN: I would think so, your Honor, yes.

MS. VLADECK: I would think there shouldn't be, your Honor, but I will argue that at the time. I think the

discovery so far would suggest that there shouldn't be dispositive motions.

THE COURT: Okay. One thing which I don't want to do is -- I'm aware that you've been diligently pursuing a first discovery cutoff, which is great, and that there are holidays coming up. And one advantage obviously of a discovery cutoff is you conduct all the discovery that's reasonable within the time limit that's imposed. The fact that I extend the discovery cutoff shouldn't be an invitation to conduct lots of other discovery. If I had kept the December 15 deadline for the conclusion of discovery, the amount of discovery on the O'Melveny investigation would be remarkably truncated. It would be.

MS. VLADECK: I agree, your Honor.

THE COURT: And so the fact that I extend or I'm inclined to extend the deadline shouldn't be an invitation to conduct the trial within a trial that I've talked about.

MS. VLADECK: Understood.

THE COURT: Okay. Anything else?

MS. PLEVAN: No, your Honor.

MS. VLADECK: No, your Honor. Thank you.

THE COURT: Good afternoon all. Good to see you all.

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